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No. 09-446

In the Supreme Court of the United States

ANTHONY CALABRESE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a district court, in sentencing a defendant for both an offense under 18 U.S.C. 924(c) and a predicate crime of violence or drug trafficking crime, may reduce the sentence for the underlying crime in order to compensate for the mandatory minimum sentence required for the Section 924(c) offense.

2. Whether the court of appeals incorrectly applied harmless-error principles in reviewing petitioner's appeal by failing to consider the cumulative effects of alleged errors.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 572 F.3d 362.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 2009. The petition for a writ of certiorari was filed on October 13, 2009 (Tuesday following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of three counts of robbery of a commercial establishment, in violation of 18 U.S.C. 1951, and three counts of brandishing a firearm during and in relation to

the commission of those robberies, in violation of 18 U.S.C. 924(c). He was sentenced to 751 months of imprisonment, to be followed by three years of supervised release. Pet. App. 30-42. The court of appeals affirmed. *Id.* at 1-16.

1. Between April and September 2001, petitioner orchestrated the armed robberies of three Chicago-area businesses. First, petitioner and several other men, one brandishing a pistol, bound two victims at a leather goods store with duct tape before stealing leather coats and roughly $10,000 in cash. Pet. App. 3-4. Next, individuals acting at petitioner's direction raided a tattoo parlor at gunpoint, tied up the occupants, stole the establishment's equipment, and pounded with a hammer the hands of one tattoo artist in retaliation for his tattooing of a mob boss's daughter. *Id.* at 4-5. Finally, petitioner and his associates robbed a butcher shop of $15,500. Petitioner himself wielded a firearm during that offense and told the shop's owner that if he did not keep quiet, his children would be killed. *Id.* at 5-6.

A few months after these events, one of petitioner's accomplices in two of the robberies, Ed Frank, began cooperating with the government. While wearing a wire, Frank met with petitioner, who made references to criminal activity, issued death threats, and beat Frank. Pet. App. 6-9.

2. A grand jury indicted petitioner on three counts of robbery of a commercial establishment, in violation of 18 U.S.C. 1951, and three counts of brandishing a firearm during and in relation to the commission of those robberies, in violation of 18 U.S.C. 924(c). The district court denied petitioner's motion to sever the counts of the indictment and to try each robbery separately. Pet. App. 10. The case proceeded to trial, and, after hearing

the testimony from many of petitioner's victims and accomplices, as well as the audio recording of Frank's conversation with petitioner, the jury found petitioner guilty on all six counts. *Id.* at 6-7.

3. In imposing sentence, the district court was required by 18 U.S.C. 924(c) to impose three consecutive terms of imprisonment of seven, 25, and 25 years for each of petitioner's three firearms convictions. Those sentences yielded a total mandatory minimum sentence of 57 years, or 684 months, to run consecutively to the sentence for any other count of conviction. See 18 U.S.C 924(c)(1)(A)(ii) and(C)(i). On the three robbery convictions, which carried no mandatory minimum, the presentence investigation report (PSR) recommended a total advisory Guidelines range of 135 to 168 months of imprisonment. PSR 22; 7/18/08 Sent. Tr. 39. The PSR noted that, because petitioner was subject to the mandatory minimum sentences specified in Section 924(c), he was not subject to a six-level firearms enhancement in the base offense level for his robbery offenses. See Sentencing Guidelines § 2B3.1(b)(2)(B) (imposing a six-level enhancement if a firearm is used during a robbery); Sentencing Guidelines § 2K2.4 cmt. n.4 ("If a sentence under [Section 924(c)] is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense.").

Petitioner requested that the court "impose no additional time" on the robbery counts. 7/18/08 Sent. Tr. 65; see Def. Sent. Memo. 7 (asking to be sentenced to the "statutory mandatory minimum sentence, 684 months"). While acknowledging at the sentencing hearing that the exact sentence on the robbery counts "may be an aca-

demic discussion" because petitioner was already in his late 40's and "would be an extremely old man * * * if he were to live out his sentence of 57 years" required by statute, petitioner's counsel nevertheless advocated for an "extremely low" additional period of imprisonment. 7/18/08 Sent. Tr. 67.

The district court noted that it was required by *United States* v. *Roberson*, 474 F.3d 432 (7th Cir. 2007), to "consider the robberies at issue here independent of the 924(c) add-ons." Pet. App. 45. In undertaking that evaluation, the district court balanced the "violent nature" of petitioner's offense against several mitigating factors. *Id.* at 46. The court noted that petitioner had taken advantage of his time in prison to complete educational and vocational training and had strong family support. *Ibid.* It also recognized that, in light of the consecutive 57-year sentence it was required to impose, additional time was not needed to protect the public from further crimes. *Id.* at 46-47. After weighing these factors, the court varied from the Guidelines and imposed a sentence of 67 months, less than half of the low end of the advisory Guidelines range. *Id.* at 47. The district court further stated that, had it been permitted to consider the consecutive firearms sentences in setting the punishment for the robbery convictions, it would have analyzed the sentence differently on those counts. *Id.* at 45.

4. The court of appeals affirmed. Pet. App. 1-16. The court first rejected petitioner's claim that the district court had abused its discretion in denying his severance motion. *Id.* at 10-12. It disagreed with petitioner's contention that "the evidence was shaky as to his involvement in each individual robbery," instead deeming that evidence to be "overwhelming." *Id.* at 11-

12. The court of appeals also noted that the district court had instructed the jury to consider each count separately and that much of the evidence of the other robberies would have been admissible at separate trials under Federal Rule of Evidence 404(b). *Ibid.* In light of these considerations, the court concluded that any prejudicial spillover from trying the counts together "was harmless" and thus that petitioner had "failed to establish that holding a single trial caused him actual prejudice." *Id.* at 12.

The court next found that the district court committed no abuse of discretion in permitting the jury to hear the audiotape of petitioner's conversation with Frank. Pet. App. 12-13. The court of appeals held that a "reasonable person" could conclude "that the conversation on the audiotape was relevant and that, with the worst parts excised, its probative value was not substantially outweighed by the danger of unfair prejudice." *Id.* at 12. After finding that the contents of the audiotape were plainly relevant, the court recognized that the question of prejudice was "a closer call." *Id.* at 13. In the end, however, the court concluded that, while it would have been reasonable for the district court to provide the jury with a transcript instead of playing the tape itself, it was equally reasonable to think "that the tape worked better overall." *Ibid.* The court therefore found "no abuse of discretion." *Ibid.*

The court of appeals also rejected petitioner's claim of insufficient evidence, which was grounded in an attack on the credibility of the witnesses who testified against him. Pet. App. 13-14. The court refused to second-guess the jury on that point, concluding that "minor inconsistencies" in the testimony of some of petitioner's accomplices or the possible existence of a "motive to lie" did

not render that testimony legally incredible, and that, if those witnesses were believed, the jury had received more than sufficient evidence to convict. *Id.* at 14.

Turning to petitioner's sentence, the court of appeals recognized that the district court had properly applied the holding in *Roberson* "that the mandatory add-on sentence flowing from using a gun in a crime of violence may not be used to justify a lower sentence on the underlying offense." Pet. App. 14 (citing *Roberson*, 474 F.3d at 436). While accepting for purposes of argument petitioner's claim that "the law may *possibly* be different in other circuits," the court reasoned that "the rule we adopted [in *Roberson*] is the only choice consistent with separation-of-powers principles" and noted that at least three other courts of appeals had agreed with its conclusion. *Id.* at 15-16. Considering petitioner's "pivotal role" in three violent robberies, the court of appeals concluded that petitioner's "*below-guidelines* concurrent sentences of 67 months on each of the three robbery counts is not unreasonable." *Id.* at 16.

ARGUMENT

1. Petitioner contends (Pet. 12-21) that the decision below perpetuates a disagreement among the courts of appeals concerning whether a district court may consider the effect of consecutive mandatory minimum sentences when fashioning a sentence on other counts of conviction. There is no circuit conflict on that question, and the decision below is correct. Any disagreement between the decision below and various district court decisions does not warrant this Court's attention, especially because petitioner himself has conceded that the dispute in this case is largely academic. Further review therefore is not warranted.

a. As petitioner acknowledges (Pet. 4, 13), four courts of appeals have concluded that a district court may not consider a consecutive sentence imposed for a violation of 18 U.S.C. 924(c) when selecting a reasonable sentence for the predicate offense under 18 U.S.C. 3553(a). See Pet. App. 14; *United States* v. *Chavez*, 549 F.3d 119, 135 (2d Cir. 2008); *United States* v. *Hatcher*, 501 F.3d 931, 933 (8th Cir. 2007), cert. denied, 128 S. Ct. 1133 (2008); *United States* v. *Franklin*, 499 F.3d 578, 584-585 (6th Cir. 2007).

The reasoning and result of those decisions are correct. Section 3553(a) requires a court to consider a host of general factors in setting a defendant's total sentence, but those standards do not apply where "otherwise specifically provided." 18 U.S.C. 3551(a). Section 924(c)(1)(D)(ii) specifically provides that, "[n]otwithstanding any other provision of law, no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed." As the courts of appeals have recognized, that prohibition on concurrent sentences is intended to ensure that the penalties for using or carrying a firearm during a crime of violence are imposed over and above

any sentence for the underlying crime.[1] *Chavez*, 549 F.3d at 134; *Roberson*, 474 F.3d at 434-436.

Petitioner's argument conflicts with Congress's prohibition in Section 924(c)(1)(D) on concurrent punishments. Reducing the sentence on the underlying crime to compensate for the mandatory minimum sentence under 18 U.S.C. 924(c) would effectively result in a sentence for that crime that, to the extent of the reduction, runs concurrent with the sentence for the 924(c) offense. See *Chavez*, 549 F.3d at 135 ("if the court reduces the prison term imposed for that underlying count on the ground that the total sentence is, in the court's view, too severe, the court conflates the two punishments and thwarts the will of Congress"). Thus, as the court of appeals concluded, the proper way to reconcile the Congressional commands in Sections 3553(a) and 924(c) is to require that a sentencing judge determine the appropriate punishment for the underlying offense without reference to the mandatory sentence required under Section 924(c).

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[1] An application note to the Sentencing Guidelines provision corresponding to 18 U.S.C. 924(c) recognizes that "a term of imprisonment imposed [under Section 924(c)] shall run consecutively to any other term of imprisonment." Sentencing Guidelines § 2K2.4 cmt. n.2(B). The commentary further directs that, when sentencing a defendant for both a Section 924(c) offense and the underlying crime, the district court should not "apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense," because "[a] Sentence under this guideline accounts for any explosive or weapon enhancement for the underlying offense of conviction." Sentencing Guidelines § 2K2.4 cmt. n.4. As noted above, see p. 3, *supra*, the PSR followed that instruction in calculating petitioner's advisory Guidelines range on the robbery offenses.

b. Contrary to petitioner's argument, there is no conflict among the courts of appeals on this question. Petitioner first points (Pet. 4-5, 14) to several district court decisions imposing sentences for predicate offenses significantly below the advisory Guidelines range on defendants who also received mandatory consecutive sentences under Section 924(c). See *United States* v. *Barton*, 442 F. Supp. 2d 301, 303-304 (W.D. Va. 2006), aff'd, 216 Fed. Appx. 355 (4th Cir.), cert. denied, 552 U.S. 835 (2007); *United States* v. *Ciszkowski*, 430 F. Supp. 2d 1283, 1289 (M.D. Fla. 2006), aff'd, 492 F.3d 1264 (11th Cir. 2007); *United States* v. *Ezell*, 417 F. Supp. 2d 667, 678 (E.D. Pa. 2006), aff'd, 265 Fed. Appx. 70 (3d Cir.), cert. denied, 129 S. Ct. 655 (2008); *United States* v. *Angelos*, 345 F. Supp. 2d 1227, 1260-1261 (D. Utah 2004), aff'd, 433 F.3d 738 (10th Cir.), cert. denied, 549 U.S. 1077 (2006). But those district court decisions are not precedential and do not establish a conflict warranting this Court's review. See Sup. Ct. R. 10(a). Although each judgment was affirmed, none of the courts of appeals considering them expressed any opinion on the propriety of the sentence the district court imposed. Nor did the courts of appeals "allow[ ]" (Pet. 14) the district courts to take the actions they did. Because the government did not cross-appeal in any of those cases, the courts of appeals had no power to correct the improper sentences even if they had wished to do so. See *Greenlaw* v. *United States*, 128 S. Ct. 2559, 2562 (2008). When squarely faced with a government challenge to such a sentence, there is no reason to doubt that the Third, Fourth, Tenth, or Eleventh Circuits would agree with the analysis of the four courts of appeals that have confronted the issue and conclude that district courts may not reduce the sentence for an underlying predicate

offense to compensate for the mandatory minimum sentence required by 18 U.S.C. 924(c).

Petitioner incorrectly argues (Pet. 15-16) that there is a conflict between the decision below and *United States* v. *Vidal-Reyes*, 562 F.3d 43 (1st Cir. 2009). *Vidal-Reyes* deals not with a consecutive sentence under 18 U.S.C. 924(c) but with the federal aggravated identity theft statute, 18 U.S.C. 1028A. Unlike 18 U.S.C. 924(c), that statute specifies that the district court shall not reduce the term of imprisonment "for the felony during which the means of identification was transferred, possessed, or used" to take into account the mandatory consecutive sentence specified in Section 1028A(a)(1). 18 U.S.C. 1028A(b)(2). To give effect to the plain meaning of that provision, the First Circuit held that district courts may consider the mandatory minimum sentence "when sentencing for *non-predicate* offenses." *Vidal-Reyes*, 562 F.3d at 51. In reaching that conclusion, however, the court of appeals explicitly considered the cases interpreting 18 U.S.C. 924(c), including the Seventh Circuit's decision in *Roberson*, and found them "easily distinguishable" based on "significant differences" in the relevant statutory text. *Vidal-Reyes*, 562 F.3d at 52. Among other things, the court in *Vidal-Reyes* noted in particular that the cases interpreting Section 924(c) have applied its "bar on considering the mandatory term in sentencing on other counts of conviction" only "to sentencing for predicates of the § 924(c) offense." *Ibid.* The First Circuit therefore expressed in dicta the view that there existed "an implied sentencing limitation in § 924(c) that mirrors the express sentencing limitation in the text of § 1028A(b)(3), which applies to *predicate* offenses only." *Ibid.* The convictions at issue here were all predicate offenses to petitioner's convictions under

Section 924(c), and therefore, even under the First Circuit's reasoning, the district court in this case could not have considered the mandatory minimum penalty on the firearms offenses when imposing sentence.

There is similarly no merit to petitioner's contention (Pet. 17-18) that the decision of the court of appeals conflicts with *United States* v. *Guthrie*, 557 F.3d 243 (6th Cir. 2009). In *Guthrie*, as in this case, the district court imposed a predicate offense sentence of approximately half the advisory Guidelines range. *Id.* at 247. While the Sixth Circuit upheld the reasonableness of that sentence, it specifically reaffirmed its holding in *Franklin* that a court may not "try[] to negate the mandatory minimum sentence for use of a firearm during a crime of violence." *Id.* at 255. Because there was no evidence other than "mere inference" that the below-range sentence for the predicate offense in *Guthrie* reflected an attempt to compensate for the consecutive sentence mandated by Section 924(c), rather than an honest and independent evaluation of the other factors under 18 U.S.C. 3553(a), the panel found no violation of *Franklin*.[2] *Guthrie* is thus consistent both with *Franklin* and the decision below.

c. Contrary to petitioner's argument (Pet. 18-20), the court of appeals' reasoning does not conflict with *Kimbrough* v. *United States*, 552 U.S. 85 (2007). *Kimbrough* permits district courts to vary from the advisory Sentencing Guidelines range based on general disagreements with the Guidelines themselves. *Id.* at 101. But *Kimbrough* does not authorize sentencing courts to dis-

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[2] In any event, any intracircuit conflict between *Franklin* and *Guthrie* should be resolved by the Sixth Circuit. The existence of such intracircuit tension does not give rise to a need for this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

agree with Acts of Congress governing their actions or to impose sentences in violation of statutory commands. As this Court explained in *Kimbrough*, "sentencing courts remain bound by the mandatory minimum sentences" Congress specifies. *Id.* at 107. Similarly, sentencing courts must respect the congressional directive in Section 924(c)(1)(D)(ii) that the sentence selected for a predicate offense not run concurrently with the mandatory minimum sentence commanded in Section 924(c)(1)(A)—a directive that would be thwarted by reducing the otherwise-appropriate sentence on the predicate offense because of the Section 924(c) sentence. Nothing in *Kimbrough* counsels otherwise.

d. Finally, even if the Court wished to address the question presented, petitioner's case would not provide a suitable vehicle. Petitioner, age 49, is currently scheduled for release from imprisonment on July 19, 2061. Even were the 67-month sentence imposed for his robbery convictions to be eliminated entirely, the unchallenged 57-year mandatory minimum sentence petitioner faces for his firearms convictions would extend his term of imprisonment well beyond his natural life expectancy. Any error in this case thus would be essentially academic and would not justify this Court's review.

2. Petitioner also contends (Pet. 21-26) that the court of appeals misapplied principles of harmless error and cumulative error analysis. The court of appeals' correct rejection of that argument does not merit this Court's review.

The general principles governing harmless-error analysis are well settled. When a court of appeals concludes that an error occurred during a criminal proceeding, it must nonetheless affirm the judgment if the error had no effect on the outcome of the trial or the substan-

tial rights of the parties. Fed. R. Crim. P. 52(a); see *Kotteakos* v. *United States*, 328 U.S. 750, 760 (1946). If a court finds more than one error, it must consider the cumulative effect of all those errors in evaluating harmlessness. *Taylor* v. *Kentucky*, 436 U.S. 478, 487 n.15 (1978); *United States* v. *Diharce-Estrade*, 526 F.2d 637, 642 (5th Cir. 1976).

The cumulative error doctrine has no application here. "[A] cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors." *United States* v. *Rivera*, 900 F.2d 1462, 1471 (10th Cir. 1990). In this case, the court of appeals rejected each of petitioner's three claims of error on the merits. Considering the deferential standard of review, the court found no abuse of discretion and no evidence of actual prejudice to petitioner in the district court's refusal to sever the counts of the indictment for trial. Pet. App. 10-12. It also found no reversible error in the admission of the audiotape, and it concluded that more than sufficient evidence was introduced to support the convictions. *Id.* at 12-14. Although the court did hold in the alternative that any error on the severance issue was harmless, it found no error at all on petitioner's other two claims. And when only a single trial error is found, there is nothing to cumulate under the cumulative-error doctrine. Cf. *United States* v. *Conner*, 583 F.3d 1011, 1027 (7th Cir. 2009).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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